

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF TEXAS

3 HOUSTON DIVISION

4 UNITED STATES OF AMERICA

5 VERSUS

6 DAVID MORSE BARRY,

7 Defendant.

8 . . . . .

9 TRANSCRIPT OF PROCEEDINGS

10 BEFORE THE HONORABLE LEE H. ROSENTHAL

11 SENTENCING

12 APPEARANCES:

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4 GENERAL ORDER 94-15, UNITED STATES DISTRICT COURT, SOUTHERN  
5 DISTRICT OF TEXAS.

6  
7 PROBATION OFFICER:

8 Ms. Linda Wright-Bailey  
9

10  
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25

1 PROCEEDINGS

2 January 22, 2015

3 THE COURT: State your appearances and be seated,  
4 please.

10:36:17 5 MS. ZACK: Sherri Zack and Bob Stabe on behalf of the  
6 United States, your Honor.

7 MR. JARVIS: Good morning, Judge. Bob Jarvis for the  
8 Defendant.

9 THE COURT: All right. The Court notes the presence  
10 of Agent Chappell, as well. He was previously sworn previously  
11 in the hearing that immediately preceded this on the  
12 co-Defendant in the case. And he remains under oath if his  
13 testimony is required.

14 You may be seated, sir.

10:36:38 15 All right. Mr. Jarvis, have you and Mr. Barry  
16 together carefully reviewed the presentence report, the  
17 objections, and the addendum?

18 MR. JARVIS: Yes, ma'am.

19 THE COURT: Do you have any objections beyond the ones  
10:36:54 20 you stated in writing?

21 MR. JARVIS: No, ma'am.

22 THE COURT: All right. Let's take up those  
23 objections. And I want to do one first because I think it's a  
24 really important one, that is, in terms of its guideline impact.

10:37:12 25 You've objected to the -- to paragraphs 32, 47,

1 and 56 on obstruction which were imposed on the ground that you  
2 committed perjury in testifying as to certain matters that I  
3 found in my findings and conclusions were contradicted by the  
4 evidence, in particular, the evidence of the content of the  
10:38:08 5 electronic chats different from what Mr. Barry described;  
6 Mr. Barry's denial of existence of any of the photographs other  
7 than the ones that included him; and that his denial that he  
8 knew of any of the photographs that showed Noonan with the  
9 children or that showed the children taken at Noonan's house;  
10:38:36 10 and the denial of their presence on his own computer which was  
11 contradicted by evidence as to the circumstances and electronic  
12 indicia surrounding the presence of the photographs on  
13 Mr. Barry's laptop, including electronic evidence relating to  
14 their receipt, their access to them, accessing them, and sending  
10:39:11 15 them on to others.

16 Here's my point on those objections -- and  
17 probation will correct me if I'm wrong on this as a matter of  
18 guideline calculation -- you have argued in your objections that  
19 if I granted this, the guideline -- that if I sustained your  
10:39:41 20 objection --

21 MR. JARVIS: Yes, ma'am.

22 THE COURT: -- then the guideline -- the offense level  
23 -- the guideline calculation would be affected because the  
24 offense level would be a 42 instead of a 44 which would result  
10:39:58 25 in a range of 324 to 405 months as opposed to 360 to life,

1 correct?

2 MR. JARVIS: No, ma'am. I think -- well, according to  
3 my sentencing table, that would -- that would be a 41.

10:40:34

4 THE COURT: Oh, yeah. No. I'm looking at the wrong  
5 column, sorry.

6 MR. JARVIS: So, it would be dropping it down to a 42.  
7 But I think the Court, in order to get me to a 42 level --

8 THE COURT: No.

10:40:44

9 MR. JARVIS: -- you'd have to grant both of my  
10 objections because that would be a total of four --

11 THE COURT: Right.

12 MR. JARVIS: -- from where it is now.

13 THE COURT: Okay.

10:40:54

14 MR. JARVIS: So, if you just grant one, it doesn't do  
15 me any good.

16 THE COURT: It's a 43 now. It's life right now.

17 MR. JARVIS: Yes, ma'am. So, in order to get it down,  
18 you need to grant both of my objections the way I calculate it.

10:41:05

19 THE COURT: I think that's correct. I think that's  
20 correct.

21 May I see probation for a moment.

22 (Side-bar discussion off the record between the Court and  
23 the probation officers.)

10:42:53

24 THE COURT: Probation confirmed what I was saying  
25 incorrectly but the result is the same. Under the guideline

1 grouping rules, even if I were to grant your objection, the  
2 guideline calculation would be unaffected because it would --  
3 and I'm not going to explain the technical reasons well, but the  
4 grouping rules would result in the -- and I'm going to ask  
10:43:20 5 probation to explain how they got there so that our record is  
6 clear -- the grouping -- because this is, in fact, a 44 that is  
7 treated for guideline purposes the same as a 43 in terms of the  
8 consequence, it does -- it doesn't take it down to a 42 which  
9 would be 360 to life because, even though you would think that,  
10:43:47 10 the additional point given for the grouping that includes Counts  
11 3S and 5S --

12                   It's 5, right?

13           THE PROBATION OFFICER: That's correct, your Honor.

14           THE COURT: -- would add another point back in. So,  
10:44:07 15 that would take us back down to life. That's the reason.

16           MR. JARVIS: Okay.

17           THE COURT: It takes us back down to a 43 or 44, so it  
18 doesn't change the guideline calculation even if you're right.

19                   Did I state it sufficiently to make our record  
10:44:24 20 clear for a reviewing Court?

21           THE PROBATION OFFICER: That's correct, your Honor.

22           THE COURT: All right, good. It's moot.

23           MR. JARVIS: I understand with that explanation,  
24 Judge.

10:44:33 25           THE COURT: All right. Having said that, it is moot

1 for guideline calculations. To the extent you want to argue the  
2 same kinds of points that bear on the 3553(a) analysis, I'm not,  
3 of course, in any way precluding you from doing that.

4 And I want to thank probation for walking me  
10:45:02 5 through what I find to be the most opaque part of the guideline  
6 calculation and counsel, obviously, agrees with me that it is  
7 opaque.

8 MR. JARVIS: Yes, ma'am. A nice way to put that.

9 THE COURT: Yes, thank you.

10:45:17 10 All right. Let's go back to the beginning of the  
11 other objections. You've made a host of objections to factual  
12 errors and omissions that -- all of which are addressed in the  
13 findings, in the conclusions, and in the motion for  
14 reconsideration or motion for judgment of acquittal and the  
10:45:40 15 ruling that followed the motion for judgment of acquittal and  
16 denied it.

17 MR. JARVIS: May I?

18 THE COURT: Go ahead.

19 MR. JARVIS: I had to write these objections and turn  
10:45:51 20 them in before.

21 THE COURT: I understand.

22 MR. JARVIS: And so, with that, I understand how the  
23 Court has ruled. We just wanted to put those on the record.

24 THE COURT: And that's fine. And for the record, I  
10:46:01 25 will state that I have carefully considered them. I've

1 considered the response from the probation officer that the  
2 information is sufficiently reliable, that it was supported by  
3 the Government's investigative material; and I don't have to  
4 limit myself to that information in any event, that is, the  
10:46:20 5 information the Government had available at the time the  
6 investigation occurred.

7 But primarily for the reasons stated in my  
8 findings and conclusions and order denying the judgment of  
9 acquittal, the opinion on that, I do not find the arguments  
10:46:39 10 relating to the factual information disclosed in the trial  
11 record, in the PSR to be erroneous, particularly, not in a way  
12 that affects guideline calculation. It doesn't, number one.

13 Number two, there is also a -- to the extent the  
14 arguments -- without diminishing anything I just said with  
10:47:15 15 respect to my own findings and conclusions and denial of  
16 reconsideration in the form of a judgment of acquittal motion,  
17 the Court denies -- the Court is not precluding Mr. Barry from  
18 arguing these points under 3553(a).

19 I think exactly the same thing applies to your  
10:47:40 20 objections under paragraphs 27, 42, and 51; and I think that  
21 addresses all of your objections.

22 MR. JARVIS: Yes, ma'am.

23 THE COURT: The Court adopts the PSR, directs it be  
24 made part of this record. Under the PSR, the total offense  
10:48:07 25 level is 43 and the criminal history category is I, which is a



1 life sentence. There is a fine range but no ability to pay.  
2 I'm not going to impose a fine. I will, obviously, impose the  
3 \$400 mandatory assessment.

4 At this time, I'd like to hear from Mr. Barry and  
10:48:28 5 from counsel; and then, I'll hear from the Government. I don't  
6 care which of you goes first, Mr. Jarvis, Mr. Barry.

7 MR. JARVIS: Thank you.

8 THE DEFENDANT: Thank you, your Honor. While I've sat  
9 and listened to all this and read all the reports, your Honor, I  
10:48:48 10 duly respect the Court's decision in the matter of this case;  
11 but I still maintain my innocence; and I also am requesting with  
12 your Honor that, when you look at the sentencing guideline, that  
13 you take into consideration my age; and hopefully, you'll come  
14 up with a sentence where I won't have a chance not to get out  
10:49:19 15 and, at least, see some of my family again and that you won't  
16 let me stay in there and end up dying in prison.

17 Thank you.

18 THE COURT: Thank you, sir.

19 MR. JARVIS: Judge, you've heard all the evidence and  
10:49:44 20 the PSR, and I just want to highlight just a few things about  
21 Mr. Barry. You know, as a former prosecutor, I understand these  
22 are probably the worst cases, period, end of statement, worse  
23 than a murder case.

24 So, I understand what you said earlier in  
10:50:00 25 Mr. Noonan's sentencing about harsh sentences, and they're

1 designed to be harsh. And as a citizen of this country, I don't  
2 have a big objection to that; but in this case I think we got a  
3 few things that, hopefully, the Court will take into  
4 consideration and give him certainly less than a life sentence.

10:50:17

5 Honorably discharged from the military. He's  
6 always worked or gone to school every day of his life. He  
7 wanted to foster kids and so they did that. He ended up  
8 adopting the boys. They came to him developmentally delayed.  
9 He learned sign language in order to help them to begin to

10:50:36

10 speak. Had special teachers and educators come to help him get  
11 the kids -- get the boys up to speed. Well known at the school,  
12 down there all the time. PTA, teacher conferences. Was very  
13 active in the boys' lives. Took them to church. Baptized them.  
14 Coached their soccer team.

10:50:56

15 So, it's not this evil person that if you just  
16 look at the type of crime he's been convicted of there is  
17 nothing redeeming but there is. I've known David through this  
18 whole process from the Wichita Falls case on, about over four  
19 years. I met him in his home. I met his parents in their home.

10:51:18

20 They're good people. He comes from good people.

21 He's lost everything, just simply everything. He  
22 just told me here a minute ago the termination of his parental  
23 rights was held in October. So, all of that is done. He's lost  
24 his long time partner. He's lost his home. He's lost any work  
25 possibilities. And he's lost the boys. His mom has died during

10:51:39

1 all this.

2                   You look at 3553(a); and while the guidelines say  
3 it's an automatic life, the 3553(a) says you can take those into  
4 consideration. He's 56 years old. He's had a thyroid problem  
10:52:00 5 for several, if not many, years now.

6                   What kind of sentence does he need and society  
7 need in order to press upon him what he did was wrong? I mean,  
8 you said it yourself in Mr. Noonan's sentencing: He was taken  
9 advantage of by Mr. Noonan. Now, doesn't mean he's not  
10:52:16 10 responsible. And I agree completely. But he has no record,  
11 never been arrested until he meets Craig Noonan and falls into  
12 that vortex, which he should have known better and should have  
13 protected his boys from. I agree completely.

14                   But a life sentence? That's too much in this  
10:52:38 15 case for this Defendant in my opinion. If you give him a  
16 20-year sentence, 240 months, he's going to be 70-something, if  
17 he lives that long, before he's eligible to be released; and he  
18 might have a year left at that point of his life. I don't think  
19 he's going to be a danger to society at that point. He  
10:52:59 20 certainly will have learned his lesson; and all of the  
21 restrictions that you will put on him, of course, he will abide  
22 by.

23                   But a 30-year sentence guarantees him death. He  
24 won't live that long. And at his age with his history and the  
10:53:14 25 way this case took place, I think a 20-year sentence certainly

1 satisfies 3553(a); and that's what we'd ask the Court to do is  
2 give him some hope that at some point in time he might be  
3 released, if he lives that long.

4 THE COURT: So, you want 240 months?

10:53:38 5 MR. JARVIS: Yes, ma'am.

6 THE COURT: You don't want even 360?

7 MR. JARVIS: We would like 240.

8 THE COURT: That's what you've argued for, right?

9 MR. JARVIS: Yes, ma'am. A 20-year sentence. Thank  
10:53:49 10 you, Judge.

11 THE COURT: Thank you, sir.

12 Ms. Zack.

13 MS. ZACK: Your Honor, there is no question that  
14 Mr. Barry's actions caused irreparable harm to these children,  
10:54:03 15 and your Honor indicated that Mr. Noonan was certainly a driving  
16 force in some of it. But you also acknowledged that does not  
17 negate Mr. Barry's culpability.

18 And I would point out that this Court heard from  
19 Mr. Barry. Mr. Barry is not a stupid man. Mr. Barry is a  
10:54:30 20 well-educated man who has at times found successful employment  
21 and successful endeavors. He was in a very long term, very  
22 stable relationship. He, if not physically, because we have no  
23 proof, though, I would argue he did, emotionally cheated on his  
24 partner.

10:54:52 25 The lengths he went to in order to accomplish

1 that, the surreptitiousness of it, the traveling to Houston, the  
2 using the children I believe to meet whatever needs he and  
3 Mr. Noonan had in this sexual depravity show an absolute lack of  
4 respect not only for the children but for the laws of the United  
10:55:22 5 States; and it also demonstrates his inability to acknowledge on  
6 any level what was going on.

7 He sat before this Court and denied left and  
8 right that he had any type of sexual interest in children. He  
9 didn't provide these children just because that's what  
10:55:42 10 Mr. Noonan wanted. Your Honor saw those chats. That is not  
11 somebody who doesn't have a sexual interest in children. He  
12 exposed them to somebody who is clearly a sexual predator.

13 I mean, there's no doubt about that, that  
14 Mr. Noonan is a sexual predator; and he, too, became a sexual  
10:56:11 15 predator when he turned those chats into something more and  
16 allowed these children to be violated and photographed and  
17 exposed to a lifestyle and a -- just activities that were  
18 inconsistent with their proper development and with good  
19 parenting and with sound judgment.

10:56:41 20 I think that a 240-month sentence is offensive to  
21 what was done to them. I think that he was more culpable than  
22 Mr. Noonan in some ways because he was their parent and by  
23 virtue of that should have protected them from anything and  
24 everything. And instead, he walked them into the mouth of the  
10:57:10 25 dragon and stayed there with them and used them for his own

1 sexual gratification and to cement a relationship with someone  
2 else who had similar deviant interests.

3 I believe that a 360-month sentence is more in  
4 line with the activities and the culpability that Mr. Barry had;  
10:57:37 5 and the fact that he may not survive that is of his own making,  
6 not anything that this Court imposed. Your Honor didn't get to  
7 decide at what date and time he decided to leave what was  
8 seemingly a very normal middle class, happy family existence and  
9 go down that path. But he made a series of bad decisions  
10:58:05 10 followed by bad decision followed by bad decision.

11 At any time, he could have stopped; but, no, he  
12 went to Houston. He went to see Whittington. He did all of  
13 these things; and while none of the Whittington behavior  
14 necessarily affects the guideline calculation, it demonstrates  
10:58:27 15 that this was not a one time thing. The chats demonstrate that  
16 he was inviting other people over to partake of his children.

17 Whether that came to fruition or not, it  
18 demonstrates that this is not -- he was not just a pawn. Did  
19 Mr. Noonan use him? Absolutely. But he was a willing  
10:58:50 20 participant and he wanted to be used. You saw the emotional  
21 connection. It was ferreted out at the trial.

22 He absolutely is unwilling to accept or  
23 acknowledge what that relationship was, for whatever reason; but  
24 his unwillingness to even accept any of that demonstrates why a  
10:59:14 25 30-month (sic) sentence is appropriate to protect the public and

1 to protect other children because he clearly cannot control his  
2 own behaviors and is, obviously, at the mercy of whatever it is  
3 that allowed him to engage in a relationship with Mr. Noonan in  
4 the first place and any of those other individuals online.

10:59:40

5 He took it to the next level. And now, these  
6 children have to pay for it. They were at a good place. Then,  
7 they're removed from whatever they knew; and unfortunately, due  
8 to the laws of the United States, his partner has absolutely no  
9 claim on those children even though the partner had no

11:00:04

10 culpability and would have been a suitable caregiver; and it  
11 would have maintained stability for those children. But now,  
12 they have none of that, and they have none of that because of  
13 him.

11:00:21

14 Hopefully, they will land in a good place, be  
15 adopted by a good family, and have a good life; but the damage  
16 can't be undone. And it's his fault, and he needs to take  
17 responsibility for that. And I don't believe there's any level  
18 -- at any level does he think he did anything wrong to this day.  
19 And I understand he has appellate rights and all that, but there

11:00:47

20 is absolutely -- and there has never been an acknowledgement  
21 that he has a sexual interest in children and that what he did  
22 harmed them in that way.

11:01:12

23 And we would ask that your Honor fashion an  
24 appropriate sentence and attach a lifetime supervision to that  
25 in order to protect the public.

1 THE COURT: Mr. Jarvis, and then I'd like to see  
2 probation.

3 MR. JARVIS: I have to take issue with just a few  
4 things. The chats only show an invitation to one person, out of  
11:01:22 5 all of the chats that were available, to come and visit. There  
6 was never a chat to anybody that said --

7 THE COURT: Well, it was come and visit for specified  
8 purposes, as I recall, that included seeing the children naked,  
9 among other things.

11:01:35 10 MR. JARVIS: Yes, I understand that. But if -- and  
11 again, you didn't believe this; but if you're a nudist, seeing  
12 the kids naked is not a big deal.

13 THE COURT: Well, being nude together may not be a big  
14 deal; but taking a visit for the express purpose of seeing the  
11:01:49 15 children naked in the context of a chat about how large their  
16 penises were and how they appeared naked I think is a little  
17 more suggestive than you are indicating.

18 MR. JARVIS: And perhaps so, Judge. But had there  
19 been the intent to do what the Government says he was clearly  
11:02:07 20 saying he was going to do, allowing somebody to partake of his  
21 children, why didn't he in any of those chats say that?

22 And neither did Mr. Noonan. Never once in all  
23 their chats was there any insinuation between Mr. Noonan and  
24 Mr. Barry "I sure enjoy touching your kids" or anything near  
11:02:26 25 that. Now, we have some posts and we've read those, but there's



1 nothing in the chats themselves that actually say that.

2 The other thing is the Government forgets that  
3 there was never any evidence that Mr. Barry ever knew Mr. Noonan  
4 was a registered sex offender.

11:02:46 5 THE COURT: No, I don't think the Government suggested  
6 otherwise, and I certainly agree with you there is no such  
7 evidence.

8 MR. JARVIS: Well, then, the argument that he  
9 willingly took them to the mouth of the lion, he didn't know  
11:02:59 10 Mr. Noonan was a lion. And was it bad parenting? Absolutely.  
11 And should it be punished? Absolutely. I agree with all that.  
12 My argument is if he didn't know he was a registered sex  
13 offender, surely, that would lower some of his degree of  
14 punishment to where he shouldn't be given the life sentence or  
11:03:15 15 the 360 months which is, in essence, a life sentence because he  
16 actually didn't know.

17 Thank you, Judge.

18 THE COURT: All right.

19 Did you want to respond to anything, Ms. Zack?

11:03:24 20 MS. ZACK: Just real quickly. It's not just that  
21 there were all of the chats. And I know this Court looks at the  
22 totality of the circumstances. It's the person he was chatting  
23 with, the fact that those chats discussed the illegality. And  
24 so, I think they were very careful in what they said, to some  
11:03:42 25 extent, sometimes on those chats.

1 THE COURT: Careful of what they sent.

2 MS. ZACK: Right. Sorry, sent. Then, they --

3 THE COURT: Or not careful enough but careful --

4 MS. ZACK: Correct.

11:03:52 5 THE COURT: -- nonetheless.

6 MS. ZACK: And it wasn't -- I think the Court fully  
7 acknowledges that it was contact not just with Mr. Noonan, not  
8 just with the chat person but also with Mr. Whittington. I  
9 mean, this was a network, this was not a one-time thing. This  
10 wasn't just one incident. It was a cumulative comprehensive  
11 event that involved a lot.

12 And while maybe each little thing could be  
13 explained away, when you put them all together, all it  
14 demonstrates is that this was a choice he made to do these  
11:04:27 15 things and to put his children in harm's way.

16 THE COURT: May I see probation.

17 (Side-bar discussion off the record between the Court and  
18 the probation officers.)

19 THE COURT: The Court, I believe, is ready to rule.

11:06:11 20 The lawyers and Mr. Barry sat through the last sentencing, and I  
21 don't need to repeat the general comments on these kinds of  
22 offenses.

23 I do need to note that Mr. Barry is, again, a  
24 heartbreaking mixture of evidence of a life lived well and  
11:06:37 25 evidence of a life lived with what amounts to cruelty to those

1 he was responsible for loving and protecting and nurturing; and  
2 having to sentence someone who stands before the Court with both  
3 qualities is difficult.

4 I've upheld the guideline calculation; but it is  
11:07:19 5 troubling to me in one respect -- and I've given the parties an  
6 indication of it -- and that is, that for reasons of technical  
7 guideline arithmetic, in essence, a sentence that would have  
8 been for guideline purposes either 360 to life or 324 to life --  
9 I mean, to 405, depending -- since 43 and 44 are the same for  
11:07:48 10 guideline purposes, if you back up two it would be, in effect,  
11 324 to 405 as opposed to life. That is nobody would think other  
12 than a very harsh sentence, particularly, for a man of 56 years  
13 old; but it is not life.

14 It is not even 360 months. It is not 30 years,  
11:08:18 15 it is 27 years. It is harsh enough, but it respects the  
16 guideline structure while acknowledging two points. Number one,  
17 the obstruction counts at this stage always make me queasy  
18 because appellate review rights are intact and no one claimed  
19 that this -- in a way this is the flip side of an argument that  
11:08:50 20 I properly rejected, that it could have been worse.

21 No one claimed that Mr. Barry knowingly exposed  
22 his children to physical acts that included penetration or other  
23 even more egregious forms of sexual abuse of minors. We're not  
24 there. Nor does anyone claim that Mr. Barry distributed the  
11:09:30 25 photographs that he, I believe the evidence clearly shows, knew

1 about, helped produce, was involved in producing, and sent to  
2 others. No one claims that he did so for profit. No one claims  
3 that he did so for any purpose other than some fashion of  
4 personal satisfaction. Gratification is one way to describe it.  
11:10:09 5 Whether it's the best way is not the point. So, I'm very queasy  
6 about, as a factual and legal basis matter, imposing a  
7 perjury-based enhancement at this juncture, number one.

8               Number two, the reason that, with that included,  
9 this is a life sentence does rest on highly technical  
11:10:44 10 considerations that I am uncomfortable with, to say the least,  
11 because they don't reflect the 3553(a) factors. They don't even  
12 reflect necessarily the seriousness of the offense conduct, the  
13 seriousness of the criminal -- I mean, they don't correspond to  
14 anything except some rule for dealing with how you score  
11:11:10 15 offenses that are numerous and in some way related to each other  
16 but nonetheless different counts. That's all it is. And I  
17 don't, as a result, propose to rely on it, that part of the  
18 guideline calculation, as corresponding to or reflecting the  
19 3553 analysis that I'm required to do.

11:11:36 20               Based on that analysis, I believe that it is  
21 appropriate, considering the nature of the conduct and the  
22 nature of Mr. Barry's person, of his qualities that, obviously,  
23 made him highly vulnerable to what Mr. Noonan and others induced  
24 him to do -- he is fully responsible for his role, his  
11:12:07 25 decisions. He knew what he was doing. He knew the fragile

1 state of his own children -- he described it -- and the  
2 responsibility that that itself imposed on him.

3 Taking all of that into account, the Court  
4 believes that the appropriate sentence in this case is that  
11:12:36 5 Mr. David Morse Barry be committed to the custody of the Bureau  
6 of Prisons to be imprisoned for a term of 324 months, and that  
7 is on each of Counts -- each of the counts to be served  
8 consecutive -- concurrently -- concurrently -- for a total of  
9 324 months.

11:13:16 10 When you are released from prison, Mr. Barry,  
11 you'll be on supervised release for your life. That's life as  
12 to each count, again, concurrently. Within 72 hours of your  
13 release from the custody of the Bureau of Prisons, you must  
14 report in person to the probation office in the district to  
11:13:35 15 which you are released.

16 During supervised release, you must comply with  
17 all the standard conditions and with some additional conditions.  
18 Standard conditions include that you not commit any federal,  
19 state, or local crime; to not possess a firearm, ammunition,  
11:13:54 20 destructive device, or other dangerous weapon; that you  
21 cooperate in the collection of a DNA sample if that is  
22 authorized by law; and that you comply with the requirements of  
23 the Sexual Offender Registration Program. That includes that  
24 you report the address where you will live and any subsequent  
11:14:12 25 change of residence to the probation officer responsible for

1 your supervision and that you must register with the Sexual  
2 Offender Registration Agency in any state where you live, work,  
3 carry on a vocation, or are a student or as directed by the  
4 probation officer.

11:14:29 5           The probation officer will provide the state  
6 officials with all information required by the State Sex  
7 Offender Registration Agency and may direct you to report to  
8 that agency personally for additional processing, including but  
9 not limited to photographing and fingerprinting.

11:14:47 10           You must also participate in a mental health  
11 treatment program and/or sex offender treatment program as  
12 provided by a registered sex offender treatment provider  
13 approved by the United States Probation Officer. This may  
14 include but need not be limited to counseling sessions, whether  
11:15:05 15 group or individual, able screening, polygraph testing, or  
16 testing, whatever is available, at the appropriate time to  
17 assist in diagnosing and treating and monitoring your case  
18 administered by the sex offender contractor or its designee.

19           You will participate until you are -- as  
11:15:28 20 instructed and you must comply with all the policies and  
21 procedures of the sex offender program until you're released  
22 from that program with the approval of the probation officer.  
23 You will incur the costs associated with such sex offender  
24 treatment program and related testing based on your ability to  
11:15:46 25 pay as the probation officer determines.

1           You give up your right of confidentiality in any  
2 records for mental health treatment, including the treatment  
3 that results from this judgment, to allow the supervising  
4 probation officer to review your course of treatment and  
11:16:02 5 progress with the treatment provider. And I am going to  
6 authorize the release of the presentence report and available  
7 mental health evaluations to the mental health provider that is  
8 approved by the probation officer.

9           You are ordered not to live, work, access, or  
11:16:20 10 loiter within 100 feet of schoolyards, playgrounds, or other  
11 places primarily used by children under the age of 18 or where  
12 children frequently congregate unless approved in advance in  
13 writing by the probation officer.

14           You are ordered not to seek or maintain  
11:16:38 15 employment or to volunteer or participate in any way in any  
16 program or activity that involves minors under the age of 18  
17 without the prior written approval of the probation officer.  
18 This includes activities that are athletic, religious,  
19 volunteer, civic or cultural in nature, designed for, targeted  
11:17:01 20 to, and participated in by minors under the age of 18.

21           I order that you not have contact with minor  
22 children under the age of 18 without the prior permission in  
23 writing of the probation officer. I order that you not  
24 associate with or live with any individual who has children  
11:17:18 25 under the age of 18 unless approved in writing in advance by the

1 probation officer.

2 I order that you not view, possess, or have under  
3 your control any nude depictions of children, sexually-oriented  
4 or stimulating materials involving children, including visual,  
11:17:36 5 auditory, telephonic, or electronic media, computer programs, or  
6 services, again to expand whatever technology is available at  
7 the relevant period.

8 I order that you not patronize any place where  
9 such material or entertainment sexual in nature in any way is  
11:17:53 10 the primary source of business and that you not use any  
11 sex-related telephone number.

12 I order that you not subscribe to a computer  
13 online service or access the Internet service unless approved in  
14 advance in writing by the probation officer, and you may not  
11:18:12 15 possess software or other technology capable of doing so, again  
16 to encompass developments in technology that occur between now  
17 and supervised release, unless specifically approved in advance  
18 in writing by the probation officer.

19 And I finally order that you may have no contact  
11:18:32 20 with your victims -- particularly heartbreaking in this case --  
21 or with the family that is now their family in any way, by  
22 writing or by any other means, including via a third party  
23 without the prior written consent in advance of the probation  
24 officer.

11:18:53 25 You must pay the United States a lump sum of



1 \$400. I've waived the fine. And there's no restitution  
2 obligation sought.

3 Do the parties want a chance to negotiate the  
4 forfeiture or have you done so?

11:19:14 5 MR. JARVIS: We've agreed, Judge.

6 THE COURT: All right.

7 Do you have an order?

8 MS. ZACK: Judge, I'm going to submit an agreed order  
9 of forfeiture as to both Defendants, and we would ask that you  
11:19:23 10 order probation to include that forfeiture in the judgment --

11 THE COURT: All right. So ordered.

12 MS. ZACK: -- as to both Defendants.

13 And then, I will also be moving to dismiss the  
14 original indictment against Mr. Barry, as well; and I will  
11:19:35 15 submit all corresponding orders by close of business today.

16 THE COURT: All right, very good. I'll grant that  
17 motion.

18 Is there any request for designation to a  
19 particular facility?

11:19:45 20 MR. JARVIS: Yes, ma'am. My understanding is there's  
21 a place in Butner, North Carolina, that handles these types of  
22 cases.

23 THE COURT: Well, it handles primarily, as I  
24 understand it, the chronically ill. Now, you may argue that  
11:19:57 25 this is a form of chronic illness, but I think that they are

1 more involved -- that that facility is primarily involved with  
2 old and very sick, because they're old, patients or patients  
3 with more complicated mental -- acute medical conditions.

4 Am I correct?

11:20:16 5 MR. STABE: You are, your Honor. The main treatment  
6 -- sex offender treatment facility has now been moved to Devens,  
7 Massachusetts.

8 MR. JARVIS: That is where we would prefer to be then,  
9 Judge.

11:20:27 10 THE COURT: All right. I am going to recommend -- I  
11 have no authority to bind, but I will recommend that the Bureau  
12 of Prisons consider designating Mr. Barry to a facility where  
13 the most promising source of sex offender counseling and  
14 treatment is to be found.

11:20:50 15 Mr. Barry, you, of course, have the right to  
16 appeal.

17 MR. JARVIS: And to that, Judge, at this point in  
18 time, we would like to announce his desire to appeal. He's  
19 indigent at this point in time. We request a Court-appointed  
11:21:05 20 attorney.

21 THE COURT: All right.

22 MR. JARVIS: Our contract is complete at this point.  
23 I guess I need -- in some Courts, I need to file a motion to  
24 withdraw.

11:21:11 25 THE COURT: Well, I'm going to require you to do that,

1 too --

2 MR. JARVIS: Yes.

3 THE COURT: -- as soon as we get another lawyer  
4 identified.

11:21:16 5 MR. JARVIS: Yes.

6 THE COURT: But until then, will you file a written  
7 notice of appeal?

8 MR. JARVIS: Yes, ma'am.

9 THE COURT: Thank you.

11:21:23 10 And of course, Mr. Barry, you just invoked your  
11 right to request the appointment of an attorney because you  
12 cannot afford one to represent you on the appeal.

13 Has there been an affidavit -- financial  
14 affidavit completed?

11:21:41 15 MR. JARVIS: Probably not.

16 THE COURT: You need to do that promptly, please.

17 MR. JARVIS: Yes, ma'am.

18 THE COURT: All right. And we can then move forward  
19 on that.

11:21:52 20 MR. JARVIS: Okay.

21 THE COURT: Will you work with him on that?

22 Or I'll get Ms. Eddins to come in and talk to you  
23 about it.

24 MR. JARVIS: Thank you, Judge.

11:21:59 25 THE COURT: All right. Anything further that we need

1 to do today?

2 MS. ZACK: Nothing from the United States, your Honor.

3 MR. JARVIS: Judge, the only thing I would like to add  
4 is I appreciate the Court's professional courtesies. When you  
5 come in from way out of town, sometimes you don't know what  
6 you're getting into; and I appreciate the Court and the clerks  
7 and your people and, of course, the prosecutor's offices,  
8 especially, Mr. Chappell. They've been very courteous to us and  
9 helped us out in all of the things that we needed. So, I

10 appreciate that personally.

11 THE COURT: Thank you. These cases are always  
12 difficult to try and decide, and both -- both lawyers and their  
13 people they work with were not only diligent but effectively  
14 represented their clients, very ably represented their clients,  
15 and presented a case that the Court was -- I think it was well  
16 presented, let me just put it that way. Considering how  
17 difficult they are, that's not always easy to do.

18 Thank you.

19 MR. JARVIS: Thank you.

20 MS. ZACK: Thank you.

21 (Proceedings concluded at 11:22 a.m.)

22 C E R T I F I C A T E

23 I certify that the foregoing is a correct transcript  
24 from the record of proceedings in the above-entitled matter, to  
the best of my ability.

25 By: /s/ Gayle L. Dye  
Gayle L. Dye, CSR, RDR, CRR

03-09-2015  
Date